84-1329 (2)

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MAR 14 1985
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DIANE B. CREA,

Appellant,

— against —

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS

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DIANE B. CREA,

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-against-

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MOTION TO DISMISS APPEAL.

Pursuant to Rule 16, paragraph (1)(b), of the Rules of the Supreme Court of the United States, appellee moves this Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

JURISDICTION.

Appellant appeals from the final order of the Supreme Court of the State

of New York, Appellate Term for the 9th and 10th Judicial Districts, entered on September 26, 1984, affirming the judgment of criminal conviction of the appellant in the Justice Court, Village of Pelham Manor, County of Westchester, State of New York. The written decision dated the 9th day of December, 1983 convicted the Appellant (1) of violating Section 32, Paragraph 4(j) of the Zoning Ordinance of the Village of Pelham Manor in that on June 28, 1983 she used the building and land at premises owned in a Residence "AA" District for the keeping of pigeons, and (2) of violating Section 106, Paragraph 1 of the Building Code of the Village of Pelham Manor, in that on June 28, 1983 she did materially depart from plans and specifications approved on July 1, 1981 for a Building Permit at premises owned by her at 29 Witherbee

Avenue, Pelham Manor, New York, for, among other things, converting a garage into pigeon coops. An application for leave to appeal to the New York Court of Appeals was denied on December 20, 1984. The certificate denying leave stated that there is no question of law presented which ought to be reviewed by the court.

QUESTION PRESENTED.

The limited question presented to this Court is whether the Zoning Ordinance prohibiting the keeping of pigeons in Residence "AAA", "AA", "A" "B" and multifamily districts is constitutional.

STATUS INVOLVED.

Section 7-700 of the Village Law of the State of New York states:

"Grant of Power.-For the purpose of promoting health, safety, morals or the general welfare of the community, the Board of Trustess of a Village is hereby empowered by local law, to regulate and restrict** the size of buildings *** and the use of buildings."

Section 32, subsection 4. subdivision (j) of the Zoning Ordinance of the Village of Pelham Manor states:

"In a Residence 'AAA', 'AA' 'A', 'B' and multifamily districts no building shall hereafter be erected, altered or used nor shall any land by used for the keeping of barnyard fowl, farm animals, horses or pigeons."

STATEMENT.

Since on or about May 9, 1979, the Appellant has been and still is the owner and a resident of a certain private home located at 29 Witherbee Avenue, Village of Pelham Manor, New York, in an area designated by the local Zoning Ordinance as being in a Residence

"AA" District. Subsequent to her purchase of the real estate, she was denied permission by the Village of Pelham Manor to alter a detached accessory building on her premises for the keeping of homing pigeons, which denial was unanimously affirmed by the Board of Appeals, Village of Pelham Manor on January 7, 1981. The Appellant thereafter initiated an Article 78 Proceeding requesting the Court for a judgment reversing the decision of the Board of Appeals of the Village of Pelham Manor, which application was denied on April 8, 1981. A subsequent appeal by the Appellant was withdraw.

Subsequent thereto and on July 1, 1981, the Appellant was issued Building Permit No. 2858 at 29 Witherbee Avenue, Village of Pelham Manor, New York,

providing for the conversion of one of three garages at the property into a dressing room for a pool with a bath and storage area for pool supplies. In fact, the Appellant departed from the permit (approved plans and specifications) by converting the garage into a pigeon coop.

The trial of these proceedings took place on November 16, 1983, and a decision rendered by the Village Justice on December 9, 1983 convicting the Appellant of both charges.

It is first submitted to this Court that the Jurisdictional Statement submitted on behalf of the Appellant is somewhat misleading in that it seeks to join the two separate charges as being founded upon the keeping of racing

pigeons and coops for such pigeons. As a matter of established record, the Appellant was convicted of the keeping of pigeons as well as having materially departed from approved plans and specifications.

ARGUMENT.

We believe that there is no substantial doubt as to the constitutional validity of the Zoning Ordinance and that the issues in this case do not require plenary consideration by this Court. It is submitted that the judgment of conviction does not present a substantial federal question and hence this Court should dismiss the present appeal.

When an ordinance is within the power of the legislative body which passed it, there is a presumption that it is reasonable and just, and the judicial power to invalidate it can be exercised only from its inherent character or from evidence showing it unreasonableness. People ex rel. Knoblauch v. Warden, 216 NY 154; People v. Bannett, 40 Misc. 2d 296. Based upon the Village Law of the State of New York, it cannot be disputed that the Village of Pelham Manor possesses he power to enact the ordinance which is being challenged.

The Appellant further urges that the ordinance is unconstitutional in that it applies only to five specific residential districts and that these districts are contiguous to districts in

which pigeons are not barred. The validity of such an ordinance has long been upheld by the Courts of this state as proper and reasonable zoning as well as a valid exercise of the police power.

In Barkmann v. Town of Hempstead, 294 N.Y. 805, affg. 268 App. Div. 785, the Court of Appeals of the State of New York unanimously upheld the unanimous Appellate Division prohibition against the keeping of pigeons upon property of the plaintiff located in an undeveloped area of an "A" residential district in the Town of Hempstead. It was conceded by the Town of Hempstead that the plaintiffs had been granted permission to maintain chickens but not pigeons in an "undeveloped" area of the Town. However, the lower court went on to state:

"It is undisputed in the record that the pigeons are harbored by plaintiffs merely as a pastime. Depriving them of this pastime does not affect substantially the property rights of plaintiffs in the use of the premises, which are otherwise undisturbed and unimpaired. It furnishes no substantial basis for invalidating the ordinance. To what extent pigeons are a nuisance in a particular area is, in the first instance, a legislative matter."

The decision in Barkmann was upheld by the Court of Appeals of the State of New York in People v. Miller, 304 N.Y. 105, where a claim of harboring pigeons as a pre-existing use was rejected on the grounds that it was not of such a character as to protect it from the application of a zoning measure.

In support of the argument that the prohibition of keeping pigeons in a AA district is unconstitutional, it is contended, among other things, that the keeping of pigeons is a hobby or sport

involving the payment of entry fees and thousands of dollars of prizes and consists of a substantial right to be protected against being "unequally burdened or denied". In attempting to support the Appellant's rights to keep pigeons in a residential area because it is a hobby or a sport, the Appellant blandly and somewhat facetiously admits that there is being conducted in this residential property a business or commercial enterprise involving the purchase of expensive birds, the payment of entry fees and the training and racing of birds for substantial prizes.

CONCLUSION.

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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